

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DENNIS BEST,
Appellant,

v.

DEPARTMENT OF THE NAVY,
Agency.

DOCKET NUMBER
PH0752920452-I-1

DATE: DEC 7 1993

Neil C. Bonney, Esquire, Virginia Beach, Virginia, for
the appellant.

Cynthia L. Taylor, Norfolk, Virginia, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

OPINION AND ORDER

The appellant petitions for review, and the agency cross petitions for review, of the initial decision, issued September 11, 1992, that dismissed the appeal for lack of jurisdiction. For the reason set forth below, the Board GRANTS both petitions, VACATES the initial decision, and REMANDS the appeal for adjudication.

BACKGROUND

The appellant had served in the position of Transportation Superintendent, GM-13, for approximately ten years when the agency reassigned him to the position of Management Analyst, GM-13, on October 22, 1990. On January 30, 1992, the agency reclassified the appellant's former position as Transportation General Manager, GM-14. Several months later, the appellant filed a petition for appeal with the Board's Philadelphia Regional Office, alleging that his reassignment constituted a constructive demotion, and that it was improperly based upon age discrimination.

The administrative judge assigned to adjudicate the appeal informed the parties that a question existed regarding both the Board's jurisdiction and the appeal's timeliness. Following documentary submissions and a hearing, the administrative judge dismissed the appeal for lack of jurisdiction, finding as follows: (1) The Board has jurisdiction in cases, such as the present one, where an appellant is permanently reassigned from a position which is upgraded due to the issuance of a new classification standard or correction of a classification error, and he or she meets the legal and qualification requirements for promotion to the higher grade; (2) the appellant's former position was erroneously classified because a comparison of the duties of that position and the reclassified position revealed that the two positions were essentially the same; (3) the appellant did not establish that he met the legal and qualifications

requirements for promotion to a higher grade, however, because he did not take the steps necessary under agency regulations to ensure that his name appeared on the certificate of eligibles for promotion from which the incumbent for the newly classified position would be selected; (4) absent an appealable matter, the Board lacks jurisdiction over the appellant's allegation of age discrimination; and (5) in view of the jurisdiction determination, a decision on the timeliness of the appeal need not be made.

In his petition for review, the appellant contends that the administrative judge erred by examining the legal and qualifications requirement in terms of whether he would have been selected for the position. In its cross petition for review, the agency argues that the administrative judge erred by imposing sanctions against it, and by finding that the duties of the appellant's former position and the reclassified positions were the same. The agency further asserts that the appellant was not constructively demoted because the GM-14 position was classified under new standards that were not in effect at the time it reassigned the appellant.

ANALYSIS

The agency first asserts that the administrative judge improperly excluded any testimony by agency witnesses regarding the differences between the duties of the appellant's former position and the newly classified position as a sanction for its failure to comply with a portion of the appellant's discovery requests. Although the agency states

why it believes that the administrative judge's actions were erroneous, it does not articulate what the excluded witnesses would have testified to, or explain how the testimony affects the result reached in this case. Thus, the agency has not established that the administrative judge's alleged error was prejudicial. See *Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984); *Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981).

The agency also argues that the administrative judge erred in finding that the duties of the two positions were the same. This contention does not show error but constitutes mere disagreement with the administrative judge's credibility determinations and fact findings. See *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), review denied, 669 F.2d 613 (9th Cir. 1982) (per curiam). In finding that the duties of the two positions were the same, the administrative judge reviewed the position descriptions in question and also considered the appellant's testimony, noting that the appellant has had classification authority at the agency. Initial Decision at 4-5. The agency's cross petition for review does not provide a basis for disturbing the administrative judge's findings on this matter.

This finding, however, does not, by itself, resolve the question of whether the appellant has established that he was constructively demoted. As the administrative judge correctly stated, the Board has held that "where an employee is reassigned from a position which due to issuance of a new

classification standard or correction of classification error is worth a higher grade, the employee meets the legal and qualification requirements for promotion to the higher grade, and where the employee who held that position is permanently reassigned to a position classified at a grade level lower than the grade level to which the employee would otherwise be promoted, then the employee is reduced in grade." See *Russell v. Department of the Navy*, 6 M.S.P.R. 698, 711 (1981).

Although the agency applied the same GS-1601 classification standard to both positions, that standard was used in connection with the GM-14 position only to determine the position's title and occupational series. Appeal File, Tab 14, Exhibits 6, 7. The determination that the latter position was properly classifiable at the GM-14 level evidently was based entirely on a classification standard that was not issued until November 1991, more than one year after the appellant was reassigned. Agency File, Tab 4i. The record does not show, however, whether the position, at the time the appellant occupied it, was properly classified at the GS-13 level. If it was then classified at a lower grade in error, and if it should have been classified at a higher level, the reclassification evidently would have resulted from a correction of this error, rather than from the issuance of the new standard. Under those circumstances, the reassignment action could constitute a constructive demotion, irrespective of the subsequent issuance of the new classification standard. If the position was correctly classified when the appellant

occupied it, however, and the reclassification resulted from the application of a new standard that was not issued until after the appellant was reassigned, the reassignment would not constitute a constructive demotion under our decision in *Russell*.

We also note that the administrative judge erroneously found that the appellant did not meet the aspect of the above test that requires the appellant to establish that he meets the legal and qualification requirements for promotion to the higher grade, because he did not meet the agency's requirements for inclusion on the certificate of eligibles for promotion. Initial Decision at 6. As we explained in *Russell*, however, an appellant's entitlement to the higher grade in circumstances such as the present case is created through the proper operation of the position classification and job grading system, and not through competition for the newly classified position. 6 M.S.P.R. at 710. Thus, the appellant's name need not appear on the agency's certificate of eligibles for promotion in order for him to establish his legal and qualification requirements for promotion.

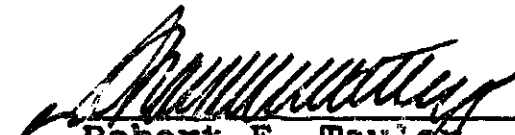
Further, the appellant's qualifications for promotion do not otherwise appear to be in dispute because he served in his former GM-13 position for over ten years and performed the same duties that are now classified at the GM-14 level. Thus, if, on remand, the administrative judge finds that the appellant has otherwise satisfied the *Russell* criteria, he

should further find that the appellant satisfies the skill and qualification requirements for promotion to the higher grade.

As mentioned earlier, a question also exists regarding the timeliness of the appeal. Upon considering the appellant's submission on the timeliness issue, we find that good cause exists for the untimely filing because the agency did not provide him with notice of any appeal rights to the Board, and the evidence does not indicate that he delayed in filing the appeal after he became aware of the basis for his claim. See Appeal File, Tab 4; *Waldau v. U.S. Postal Service*, 54 M.S.P.R. 193, 194 n.1 (1992).

Finally, we find that, if the administrative judge finds an appealable action he must afford the appellant the opportunity to develop and prove his allegation of discrimination.* See e.g., *Marchant v. Department of the Navy*, 32 M.S.P.R. 461, 464 (1987) (the Board must decide a discrimination issue in a case even if the underlying action is overturned on procedural grounds).

FOR THE BOARD:


Robert E. Taylor
Clerk of the Board

Washington, D.C.

* We note that the initial decision did not reach the appellant's discrimination claim because the administrative judge concluded that the Board lacked jurisdiction over the appeal. Initial Decision at 7.